

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

LOUIS R. HUSBAND,

Plaintiff,

vs.

ANNETTE CHAMBER-SMITH, *et al.*,

Defendants.

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Case No. 1:23-cv-170

Judge Jeffery P. Hopkins

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter is before the Court on the Report and Recommendation issued by Magistrate Judge Chelsey M. Vascura on August 22, 2023. Doc. 5. The Magistrate Judge recommends that this action be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. Plaintiff has filed objections. Doc. 6. For the reasons below, the R&R is **ADOPTED** in its entirety. This action shall be **DISMISSED WITHOUT PREJUDICE**.

On March 24, 2023, Plaintiff filed a motion for leave to proceed *in forma pauperis*. See Doc. 1. Upon review, the Magistrate Judge recommended that his motion be denied because his certified trust fund account statement showed he had sufficient funds to pay the \$402.00 fee required to commence a civil action in this Court. Doc. 2, PageID 59. Plaintiff did not file any objections to the R&R despite being advised that a failure to object would result in a waiver of the right to have this Court review the R&R *de novo*, and a waiver of the right to appeal this Court's decision adopting the R&R. *Id.* at PageID 60 (citing *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981)). This Court subsequently adopted the R&R in its entirety and ordered Plaintiff to pay the \$402.00 filing fee within

fourteen days. Doc. 3, PageID 61. The Court advised Plaintiff that failure to timely pay the filing fee would result in dismissal of this action without prejudice. *Id.* When Plaintiff did not comply with this Court's Order to pay the filing fee, the Magistrate Judge issued the subject R&R recommending dismissal for failure to prosecute. *See* Doc. 5.

Rule 41(b) of the Federal Rules of Civil Procedure provides that a district court may dismiss an action where the plaintiff has failed "to prosecute or to comply with these rules or a court order." Fed. R. Civ. P. 41(b). District courts are expected to consider certain factors when deciding whether to dismiss under such circumstances, including:

- (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Schafer v. City of Defiance Police Dep't, 529 F.3d 731, 737 (6th Cir. 2008) (quoting *Knoll v. AT&T*, 176 F.3d 359, 363 (6th Cir. 1999)). Here, the Magistrate Judge found that these factors favored dismissal. In his objections, rather than address these factors or explain his failures to object to the Magistrate Judge's previous R&R or comply with this Court's Order, Plaintiff now urges the Court to reconsider his application to proceed *in forma pauperis*. *See* Doc. 6.

The Magistrate Judge correctly determined that the aforementioned factors favor dismissal. Having been advised that he was required to pay the filing fee, Plaintiff was at fault when he failed to do so. He was warned that his failure to pay the filing fee within the time required would result in dismissal. And then, only after the Magistrate Judge recommended dismissal, did he request that this Court reconsider his request to proceed *in forma pauperis*.

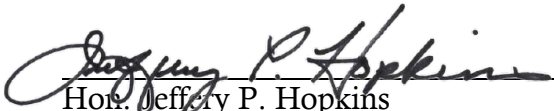
Because dismissal without prejudice is a "comparatively lenient sanction," *Muncy v. G.C.R., Inc.*, 110 F. App'x 552, 556 (6th Cir. 2004), this Court finds it to be appropriate

considering the circumstances. In doing so, the Court passes no judgment on the merits of Plaintiff's request for reconsideration. Plaintiff remains free to re-file this action. At that time, he may request anew permission to proceed *in forma pauperis* and provide a current certified trust fund account statement in accordance with 28 U.S.C. § 1915.

Accordingly, the Court hereby **ADOPTS** the R&R (Doc. 5) in its entirety, and **ORDERS** that this action be **DISMISSED WITHOUT PREJUDICE** under Rule 41(b). The Court will not assess the filing fee in this matter. If he elects to re-file this action, Plaintiff is hereby **ORDERED** to list this case (1:23-cv-170) as a related case.

IT IS SO ORDERED.

Dated: September 9, 2024


Hon. Jeffrey P. Hopkins
United States District Judge